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No. 93-1224

In the Supreme Court of the United States

OCTOBER TERM, 1993

TODD PACIFIC SHIPYARDS CORP., ET AL. PETITIONERS

v.

RICHARD L. EDWARDS AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly reversed the determination by the Benefits Review Board that suitable alternative employment was available to a disabled claimant under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, who had found a job that lasted only eleven weeks, but who otherwise had been unable to secure permanent employment.

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The opinion of the court of appeals (Pet. App. A1-A11) is reported at 999 F.2d 1374. The decision of the Benefits Review Board (Pet. App. A12-A27) is reported at 25 Ben. Rev. Bd. Serv. (MB) 49. The decision of the administrative law judge (Pet. App. A28-A57) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 14, 1993. The petition for rehearing was denied on September 10, 1993. The petition for a writ of certiorari was filed on December 8, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Todd Pacific Shipyards Corporation employed respondent Richard Edwards as a welder-burner. Pet. App. A5. Petitioner Aetna Casualty and Surety Company is an insurance carrier that provides coverage to Todd Pacific Shipyards for its liability on claims under the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.* Pet. 6 n.2.

In May 1981, Edwards suffered a work-related lower back injury that ultimately left him unable to perform his usual welder-burner duties. Pet. App. A5, A30. Petitioners provided him with training as a mechanical inspector, and he obtained a mechanical inspector job in August 1985 with a manufacturing company. *Id.* at A5, A14-A15, A30. After only 11 weeks, Edwards was discharged due to a workforce reduction. *Id.* at A5. Edwards was unable to find other employment, except for a six-week temporary position as a receiving inspector starting in September 1986. *Id.* at A15, A35.

2. Edwards filed a claim for total disability benefits under the Longshore Act. After a hearing in December 1986, an administrative law judge (ALJ) awarded Edwards permanent total disability benefits.[1] Pet. App. A5, A29. The ALJ reasoned that because it was undisputed that Edwards was unable to perform his usual employment, petitioners had the burden of demonstrating that suitable alternative employment was available to him. *Id.* at A36. The ALJ found that although petitioners submitted two market surveys listing employers of

[1] It was undisputed that Edwards was entitled to only partial disability payments during his brief periods of employment as an inspector, measured by the difference between his pre-injury average weekly wages and his weekly wages as an inspector. Pet. App. A33-A34.

mechanical inspectors, the listed employers did not have current openings or the openings had experience requirements that Edwards could not meet. *Id.* at A39-A40, A42. The ALJ therefore concluded that petitioners did not satisfy their burden of establishing the availability of suitable alternative work for Edwards. *Id.* at A42.

The ALJ also concluded that Edwards' brief periods of post-injury employment did not in themselves demonstrate that there was suitable alternative employment available to him. The ALJ rejected petitioners' argument that it was determinative that Edwards' post-injury employment ended for reasons unrelated to his disability. Pet. App. A42-A45. The ALJ distinguished a series of Benefits Review Board decisions upon which petitioners relied, noting that in those cases there had been a showing of alternative employment and that the claimant's loss of employment was due to his own conduct. *Id.* at A43-A45. Finally, the ALJ held that even if petitioners had made an initial showing that jobs were reasonably available, Edwards had rebutted that showing. The ALJ found that Edwards had diligently, but unsuccessfully, sought permanent employment as an inspector, as demonstrated by his efforts to contact the employers listed in petitioners' market surveys and by the reports of the job development specialist assigned to his case. *Id.* at A41, A45-A46.

3. On petitioners' appeal, the Benefits Review Board reversed. Pet. App. A12-A27. The Board held that petitioners are required to identify "specific suitable alternat[ive] employment that [Edwards] is capable of performing in his community considering his age, education, vocational history, and physical limitations," and that petitioners had satisfied that burden by showing that Edwards was employed after his injury. *Id.* at A20-A21. The Board declined to require an employer to iden-

tify "new" suitable alternative employment where, as here, the claimant was laid off due to economic factors, not due to his disability. *Id.* at A22-A23. Imposing such a requirement, in the Board's view, would be tantamount to making an employer a "long-term guarantor of a claimant's employment." *Id.* at A22. The Board therefore reversed the ALJ's award of permanent total disability benefits and held that Edwards was entitled only to permanent partial disability benefits.[2]

4. The court of appeals reversed, Pet. App. A1-A11, concluding that the Board erred in holding that Edwards' 11-week employment carried petitioners' burden of establishing the availability of suitable alternative work. *Id.* at A8-A10. Deferring to the view of the Director of the Office of Workers' Compensation Programs, the court held that petitioners were required to show that suitable alternative work was "realistically and regularly available." That interpretation, the court concluded, is consistent with the Act's use of wage-earning capacity as the touchstone of the extent of disability, because "earnings in post-injury employment must be sufficiently regular to establish true earning capacity." *Id.* at A8-A9. The court further reasoned that the Director's interpretation serves "the long-term remedial purpose of the LHWCA" to compensate for losses in wage-earning capacity through the employee's lifetime. *Id.* at A9.

Having ruled that the Board had erred as a matter of law, the court then held that substantial evidence

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[2] The Board stated that because it found that Edwards' 1985 mechanical inspector job conclusively resolved the issue of suitable alternative employment, it did not need to address Edwards' temporary employment in 1986 or his showing of due diligence in attempting to find employment. Pet. App. A23.

supported the ALJ's determination that petitioners had failed to show the availability of suitable alternative employment. The court noted that almost half of the openings for mechanical inspectors listed in petitioners' market surveys required experience Edwards did not have, that Edwards had contacted without success the other employers in the listing, and that Edwards had searched diligently, yet unsuccessfully, for jobs at firms not listed in the survey. Pet. App. A10-A11.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with that of any other court of appeals. Further review is therefore unwarranted.

1. The issue raised by the petition is whether, as a matter of law, post-injury short-term employment precludes a finding of permanent total disability under the Longshore Act, even where a claimant diligently, but without success, seeks regular employment. Petitioners' contention is that once a claimant secures a job, however temporary, that job conclusively establishes the regular availability of such work (unless the physical impairment caused the claimant's loss of that employment) and, therefore, that the employee is not totally disabled within the meaning of the Act. The court of appeals correctly rejected that rigid rule. It properly held that substantial evidence supported the ALJ's finding that suitable alternative employment was not available to the claimant in this case, even though he had obtained some short-term employment.

Under well-established burdens of proof applicable to Longshore Act disability claims, once an employee establishes the inability to perform his or her pre-injury job duties because of an employment-related injury, the employee is presumed to be totally disabled unless the em-

ployer demonstrates the availability of suitable alternative employment. *Director, OWCP* v. *Berkstresser*, 921 F.2d 306, 311-312 (D.C. Cir. 1990). To discharge that burden, the employer must show that the employee is medically capable and otherwise qualified to perform jobs reasonably available to him or her. See, *e.g.*, *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d 1031, 1042 (5th Cir. 1981); *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 935-936 (2d Cir. 1976). Likewise, the employer must show that in fact there are such reasonably available jobs. *Turner*, 661 F.2d at 1042. If the employer satisfies those burdens, the employee may rebut the employer's evidence by showing that a diligent job search was unsuccessful. Pet. App. A11 & n.2 (citing cases).

This paradigm comports with the basic principle under the Longshore Act that disability is an economic as well as a medical concept, 33 U.S.C. 902(10), with the consequence that an employee's compensation for disability is ordinarily measured by the injury's impact on the employee's wage-earning capacity. See 33 U.S.C. 908(a), 908(c)(21); compare 33 U.S.C. 908(c)(1)-(20) (scheduled injuries), 908(c)(23) (retirees disabled by occupational disease). The degree of an employee's disability "is determined not only on the basis of physical condition but also on factors such as age, education, employment history, rehabilitative potential, and the *availability of work* that the claimant can do." *Turner*, 661 F.2d at 1038 (emphasis added). Thus, an employee who is physically capable of performing alternative work is nonetheless totally disabled if unable to secure such work and earn wages. *Ibid.*; see also *Palombo* v. *Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991); *Stevens* v. *Director, OWCP*, 909 F.2d 1256, 1257 (9th Cir. 1990) ("[u]ntil there is a job that

the injured worker can perform, his injury is totally disabling"), cert. denied, 498 U.S. 1073 (1991).

A major purpose of the Longshore Act is to compensate employees for reductions in their wage-earning capacity resulting from work-related injuries. *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C. Cir. 1984). That purpose is served by assessing, as realistically as possible, the effects of the disabling job injury on wage-earning capacity; it would be frustrated by petitioners' approach to determining job availability—that a claimant's ability to obtain a short-term job forecloses a finding of total disability, even if there are no other suitable alternative jobs available once the short-term job ends.

A single job of temporary duration may not accurately reflect the general availability of jobs in the marketplace and, therefore, the employee's capacity to earn wages on a regular basis. See 1C Arthur Larson, *Law of Workmen's Compensation* § 57.35, at 10-247 (1993) ("earnings in post-injury employment [must be] sufficiently regular and continuous to establish [a] true earning capacity"). That is precisely the case here. At the time of the ALJ hearing, there was substantial evidence to support the ALJ's conclusion that jobs were not realistically available to Edwards on a continuous basis, even though he had briefly obtained some work. See Pet. App. A42. Rather, as the ALJ found, petitioners' market surveys identified only mechanical inspector jobs that were not reasonably available to the claimant, who had made diligent, but unsuccessful, efforts to obtain permanent employment as a mechanical inspector. *Ibid.* Thus, a rule that a single job of temporary duration automatically establishes suitable alternative employment would, in this case, subvert the Longshore Act's goal of com-

pensating an employee for an actual loss of wage-earning capacity. See Pet. App. A9.

2. Petitioners assert (Pet. 24) that the decision below "discards actual employment as a measure of earning capacity." The court of appeals, however, held that Edwards' short-term employment, while relevant, was not an absolute measure of his employability. Instead, Edwards' long periods of unemployment, coupled with his unsuccessful efforts to obtain employment, supported the ALJ's conclusion that he had no realistic ability to obtain regular employment on the open market, and thus retained no significant wage-earning capacity.[3]

Petitioners also assert (Pet. 25) that the decision below imposes upon the employer a "continuing duty" to establish the existence of suitable alternative jobs for a claimant over his lifetime. Petitioners are incorrect. The decision simply sustains the ALJ's ruling that, at the time of the hearing on the total disability claim, Edwards' wage-earning capacity as a mechanical inspector was non-existent because no employment of that nature was realistically available to him.[4] If circumstances

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[3] In a related context, the Longshore Act avoids a mechanistic approach to assessing an employee's wage-earning capacity. See 33 U.S.C. 908(h) (if actual earnings of a permanently partially disabled claimant do not "fairly and reasonably represent" his wage earning capacity, the factfinder should look at other factors affecting the claimant's capacity to earn wages, including "the effect of disability as it may naturally extend into the future").

[4] Although the Benefits Review Board held that the employer had established the availability of alternative employment for Edwards, the Board is an appellate review body that does not make policy determinations or factual findings and engages only in substantial evidence review of findings by the ALJ. 33 U.S.C. 921(b)(3); *Stevens*, 909 F.2d at 1257. The Board's decision was premised on its view that Edwards' 1985 job conclusively established that he was only partially disabled, a ruling that went be-

change and the claimant secures employment in the future, or a showing of its availability to him becomes possible, the employer will have the right under the Longshore Act to seek modification of the compensation awarded to reflect the "change in conditions." 33 U.S.C. 922.

3. Petitioners point (Pet. 18-22) to a difference among the courts of appeals regarding the burden imposed on the employer to establish suitable alternative employment. The Ninth Circuit appears to require an employer to provide evidence of specific openings that are available to the claimant, whereas the Fifth Circuit accepts a more general showing of available work. Compare, *e.g.*, *Bumble Bee Seafoods*, 629 F.2d at 1330, with *Avondale Shipyards, Inc.* v. *Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992) (employer need not show specific openings and "simply may demonstrate the availability of *general job openings* in certain fields in the surrounding community") (quoting *P & M Crane Co.* v. *Hayes*, 930 F.2d 424, 431 (5th Cir. 1991)). To the extent that difference has practical significance, it does not bear directly on the distinct question that this case presents.[5] Petitioners do

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yond substantial evidence review of factual issues. Moreover, as a non-policymaking adjudicatory body, the Board's interpretations of the Longshore Act are not entitled to deference. *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). Rather, as the court of appeals recognized, it is the Director's interpretation (here, with respect to the employer's burden to show that alternative employment is realistically and regularly available) that is entitled to deference. Pet. App. A7-A8; see also *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992); *Zapata Haynie Corp.* v. *Barnard*, 933 F.2d 256, 259-260 (4th Cir. 1991).

[5] Petitioners also assert (Pet. 18-19) a conflict between the decision below and the First Circuit's decision in *Air America, Inc.* v.

not argue here that the court of appeals improperly rejected general evidence of job availability by imposing a requirement that petitioners establish actual job openings; rather, their petition focuses on whether Edwards' actual, albeit temporary, employment conclusively established the existence of suitable alternative employment. See Pet. 17 (arguing that petitioners complied with the Ninth Circuit's *Bumble Bee* standard, but that the Ninth Circuit required an even more onerous showing). The Fifth Circuit decisions cited by petitioners (Pet. 20) do not address the question of temporary post-injury employment.[6]

Director, OWCP, 597 F.2d 773, 779-780 (1979) (burden to establish suitable alternative employment did not shift to employer where former pilot, who was college trained and had a broad range of administrative and supervisory skills, no longer had the requisite degree of coordination to be a pilot, but the deficiency did not "indicate an inability to perform other work"). In *Air America*, the court specifically reserved the question of whether "in many, perhaps most, cases," the burden of demonstrating suitable alternative employment should be placed on the employer. 597 F.2d at 781. Because *Air America* reserved that question, and *a fortiori* did not discuss the nature of the burden in cases where it is properly placed on the employer, there is no conflict with *Air America*.

[6] Nor does the decision below conflict with that of the Fourth Circuit in *Brooks* v. *Director, OWCP*, 2 F.3d 64 (1993) (per curiam), as petitioners contend (Pet. 21-23). *Brooks* held that the claimant's post-injury employment showed that there was suitable alternative employment for the claimant in that case, even though the claimant had been discharged from that employment because he had falsified information pertaining to a previous injury on his employment application. *Brooks* is distinguishable because the claimant's loss of post-injury employment was due to personal misfeasance, rather than the unavailability of work; unlike here, the job continued to exist and could have been filled by the claimant if he had not falsified the injury information in violation of company rules. See Pet. App. A43-A45 (distinguishing cases like *Brooks*).

Moreover, the precise nature of an *employer*'s burden is of little importance at this stage of this case. Cf. *U.S. Postal Service* v. *Aikens*, 460 U.S. 711 (1983). Every court of appeals to address the question has recognized that even if the employer meets its burden of introducing evidence of the availability of suitable alternative employment to the claimant, the claimant may nonetheless establish total disability by demonstrating that he or she diligently tried, but was unable, to secure such employment. See, *e.g.*, *Avondale Shipyards, Inc.*, 967 F.2d at 1043; *Palombo*, 937 F.2d at 73. The ALJ specifically found that Edwards diligently sought work as a mechanical inspector but was unable to find a permanent job, a finding that the court of appeals upheld. Pet. App. A11 & n.2.

In stating that the burden of showing suitable alternative employment can be met "by showing a suitable job that the claimant actually performed after his injury," 2 F.3d at 65, the court of appeals in *Brooks* did not suggest that such a showing is sufficient in all cases, including where, as here, the claimant's actual employment was cut short by a reduction in force and there was other evidence that suitable alternative employment was not realistically available to him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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